interest. In my opinion, no injustice would be suffered by the defendant Dato Peter Lo Su Yin and/or the other defendants named herein if the interim injunction is extended. The notice of motion No. 3 of 1971 to discharge the said interim injunction remains on the cause list and has not been struck out or dismissed. He and the other defendants named herein are at liberty to come before the court with a fresh motion on another day when counsel for the defendants is ready to proceed with the hearing of the case. Counsel for the defendants urged the court to extend the interim injunction granted by the Honourable the Chief Justice on the 18th October, 1971 until the Notice of Motion No. 3 of 1971 could be heard by the learned Chief Justice. I asked counsel what is the merit in this procedure since his clients can appear before the court on another date to have the said interim injunction discharged. Counsel is unable to give a satisfactory reply to this question and I see no merit in this submission.

In my judgment, the notice of motion is hereby allowed and I hereby order that the interim injunction granted by the Chief Justice on the 18th October, 1971 be continued until after the trial of Civil Suit No. 340 of 1971 or until further order subject to the plaintiff or his counsel giving the usual undertaking as to damages in writing to be filed in this registry.

I reserve the costs of this motion to the trial judge of this suit for his disposal.

Order accordingly.

PRIVY COUNCIL REPORT

LOH BOON SIEW v. CHIN KIM & ANOR.

[P.C. (Lord Pearson, Lord Hodson, Lord Simon of Glaisdale, Lord Cross of Chelsea, and Sir Gordon Willmer) February 8, 1972]

[Privy Council Appeal No. 34 of 1970]

Contract — Sale of land — Repudiation — Inference of acquiescence in — Option — Default in exercising of in strict compliance of terms — Time made of the essence — Decree for specific performance.

Limitation — Contract — Breach of — Claim for damages.

Practice and Procedure — Writ — Specific performance — No claim for damages in the alternative.

This was an appeal from the decision of the Federal Court ([1970] 1 M.L.J. 197) allowing an appeal from a judgment and order of the High Court by which the appellant was granted specific performance of a contract to purchase a certain piece of land. On this piece of land there was a big house in which the vendors/respondents lived, and two or three small houses which were let to tenants who were protected by the Control of Rent Ordinance, 1956.

On May 16, 1961, the parties entered into a contract of sale of the said land at the price of $160,000. Briefly, the agreement was as follows. In consideration of $1,200 paid to the vendors by the purchaser/appellant, the vendors granted him an option of purchase at the price of $160,000 to be exercised within 6 months of the signing of the agreement. During such period the purchaser was to supply plans for submission by the vendors to the authorities for planning permission. Upon receipt of such permission, the purchaser was to pay the vendors forthwith the sum of $40,000 by way of deposit to account for the purchase price, and the balance of $120,000 within six months thereafter. However, in the event of planning permission being refused, the option was to be automatically extended for a further 7 months. One of the conditions of the contract was that on payment by the purchaser of the sum of $40,000, the vendors undertook to take steps to apply to the Rent Assessment Board for permission to evict the tenants on the land. It was also provided that if the vendors were unable to give vacant possession of the land, they would refund the sum of $40,000 to the purchaser

In the event, planning permission was not forthcoming and the option became extended, however, by a further agreement on November 11, 1961, whereby in consideration of a further sum of $1,200, the vendors expressly agreed to the extension of the option to May 15, 1962.

On May 5, 1962, the purchaser purported to exercise his option by remitting $40,000 to the solicitors who had drawn up the agreement for both parties. On May 4, 1962, one of the vendors died. There was a lapse of some time within which period probate was applied for.

On or about June 8, 1962, the deposit of $40,000 was returned to the purchaser on the ground that the option had not been "duly exercised". Thereafter, there was no further correspondence between the parties, or any intimation given by the purchaser as to his intentions regarding the property until the issue of a writ on August 29, 1966, in which he claimed specific performance of the contract.

The vendors pleaded, *inter alia,* default on the part of the purchaser to exercise the option in strict compliance with the terms of the agreement and that, time being the essence of the contract, delay on the purchaser's part disentitled him to a decree for specific performance.

The Federal Court held that in the circumstances of this case, the purchaser was not entitled to specific performance. The purchaser appealed.

Held, dismissing the appeal: (1) as the option was never duly exercised, the point upon which the Federal Court

decided the case against the appellant, did not arise. But on the assumption that the respondents by their letters repudiated their obligations under the agreement, the appellant had no right to a decree for specific performance when he issued his writ on August 29, 1966;

(2) on the same assumption, the appellant could have been entitled to recover damages for the vendors' breach of contract if he sued them before the period of limitation expired, but in his writ he did not claim damages as an alternative to specific performance.

Quaere: whether the court could, in its discretion, have awarded damages in lieu of specific performance.

Cases referred to:-

(1) *Hipgrave* v. *Case* (1885) 28 Ch. D. 356.

(2) *Ardeshir Mama* v. *Flora Sassoon* 55 I.A. 360.

PRIVY COUNCIL.

Raymond Walton, Q.C. and *Rupert Evans* for the appellants.

John A. Baker, R. R. Chelliah and *M. Chong* for the respondents.

Lord Cross of Chelsea (delivering the judgment of the Board): This is an appeal by Loh Boon Siew the plaintiff in the action from a judgment and order of the Federal Court of Malaysia dated 13th November 1969 allowing an appeal from a judgment and order of the High Court in Malaya by which the appellant was granted specific performance of a contract to purchase certain land at Jalan Treacher, Kuala Lumpur.

In 1961 one Wong Choong (now deceased) and his wife Chin Kim who is the first respondent to this appeal were the registered co-owners of the land in question. On the land there was a big house in which they lived and two or three small houses which were let to tenants who had the protection afforded them by the Control of Rent Ordinance 1956. They wished to sell the land and instructed one Chin, a broker, to find a purchaser for it. Chin got into touch with the appellant who wished to buy a piece of land at Kuala Lumpur on which to build a motor car showroom for his company. After looking at the land and finding it suitable for his purposes the appellant went with Chin to see Wong Choong and his wife and after some bargaining an agreement was executed on 16th May 1961 between Wong Choong and Chin Kim (described as vendors) of the first part, the appellant (described as purchaser) of the second part and Chin (described as "the broker") of the third part. After reciting the title of the vendors to the land and the fact that the vendors wished to sell it and the purchaser to buy it the agreement continued as follows:

"1. In consideration of the sum of Dollars One Thousand Two Hundred ($1,200.00) only now paid by the Purchaser to the Vendors, which sum the Vendors hereby acknowledge, the Vendors hereby grant to the Purchaser or any person or body corporate nominated by the Purchaser in writing (hereinafter referred to as "the Nominee") this OPTION to purchase the said land for the sum of Dollars One Hundred and Sixty Thousand ($160,000.00) only (*sic*) free from all encumbrances.

2. This option shall remain open for the period of six (6) months from date hereof.

3. The Purchaser shall immediately upon the signing of this option Agreement instruct a duly qualified architect to prepare plans and specifications of a building or buildings to be erected on the said land for submission to the proper authorities for approval and the Vendors shall sign all such plans, specifications and any other documents which may be necessary when requested to do so.

4. All expenses and liabilities whatsoever which may be incurred in respect of such plans and specifications shall be borne by the Purchaser or the Nominee.

5. As soon as the said plans and specifications have been duly approved, the Purchaser or the Nominee shall immediately notify the Vendors in writing of such approval and shall at the same time pay to the Vendors a sum of Dollars Forty Thousand ($40,000.00) only as deposit and such deposit shall be deemed to be part payment towards the agreed purchase price of Dollars One Hundred and Sixty Thousand ($160,000.00) only and the Purchaser and Nominee shall pay the balance sum of Dollars One Hundred and Twenty Thousand ($120,000.00) within six months from date of payment of such deposit and the sum of Dollars One Thousand Two Hundred ($1,200.00) now paid by the Purchaser to the Vendors shall be set-off against the agreed purchase price.

6. If however, the plans and specifications submitted to the proper authorities have not been approved within six months from date hereof, this option shall then be automatically extended for a further period of six months and the said sum of Dollars One Thousand Two Hundred ($1,200.00) now paid by the Purchaser to the Vendors shall be deemed to be the consideration of the said agreed extension of six months but in this event the said sum of One Thousand Two Hundred ($1,200.00) shall belong to the Vendors absolutely and shall not be set-off against the agreed purchase price.

7. Immediately on receipt of the sum of Dollars Forty Thousand ($40,000.00) only, the Vendors hereby undertake to take such steps as may be deemed necessary including legal proceedings to evict their tenants on the said land and shall immediately apply to the President or Chairman of the Rent Assessment Board for a certificate that the Rent Assessment Board is satisfied that the owners of the said land intend to demolish all buildings on the said land for the purpose of re-building and in its opinion it is in the public interest that they should be permitted to do so. All costs and expenses in this connection shall be borne by the Vendors.

8. If, within six (6) months from the date of the said deposit the Vendors are unable to give vacant possession of the said land, the Purchaser or the Nominee has the exclusive right to terminate the Agreement and the Vendors shall immediately refund to the Purchaser or Nominee the sum of Dollars Forty Thousand ($40,000.00) free of interest and this Agreement shall be null and void.

9. The Purchaser or the Nominee shall have the right, at his or the Nominee's own cost and expenses to lodge a Caveat against the title(s) to the said land the Vendors hereby consent to the same, provided that upon the expiry of the said option the Purchaser or the Nominee shall remove the same at the Purchaser's or the Nominee's own expense.

10. The Vendors hereby agree to pay to the Broker a commission of Two per cent (2%) of the agreed purchase price of $160,000.00.

11. The Purchaser hereby agrees to pay to the Broker a commission of Two per cent (2%) of the agreed purchase price of $160,000.00.

12. The completion of the transfer shall be at the office of Messrs. Y. S. Lee & Company, Advocates & Solicitors, No. 10, Klyne Street, 1st Floor, Kuala Lumpur.

13. Time wherever mentioned in this Agreement shall be the essence of this contract.

14. This Agreement shall be binding upon all the parties hereto, their heirs, executors, administrators and assigns."

The appellant had plans of the building which he wished to erect prepared and submitted them to the Town Planning Authorities but on 4th October 1961 planning permission was refused. Although clause 6 of the agreement provided for an automatic extension of the option for a further 6 months on the terms that the $1,200 paid under clause 1 should become

the absolute property of the vendors the parties executed a further agreement on 11th November 1961 whereby in consideration of a further sum of $1,200 the vendors expressly agreed to the extension of the option to 15th May 1962. The appellant pressed the Town Planning Authorities to reconsider their decision but they refused to do so and so informed him by letter dated 20th November 1961. On 4th May 1962 Wong Choong died. The second respondent the Public Trustee of the Federation of Malaya was named as Executor in his will but did not obtain probate until 12th December 1962. On 5th May 1962 the appellant's solicitors Lim Huck Aik & Co. on his instructions wrote a letter to Messrs. Y. S. Lee & Co. the solicitors who had drawn up the agreement of 16th May 1961 on behalf of both parties in the following terms:

"Dear Sirs,

Re: Certificate of Title No. 11089
Lot 97, Section 57, Town of Kuala Lumpur

On behalf of Mr. Loh Boon Siew, we send you herewith to you as solicitors for Mr. Wong Choong and Madam Chin Kim the sum of $40,000 being deposit payable. Our client intends to purchase the above property irrespective of whether the plans and specifications are approved or not.

Will you kindly have your clients, the Vendors, take the necessary steps under Clause 7 of the Agreement of Sale dated the 16th day of May, 1961 to enable our client to rebuild on the said land.

Please acknowledge receipt.

Yours faithfully,
Sgd."

The letter enclosed a cheque for $40,000 drawn by Boon Siew Ltd. on the Oversea-Chinese Banking Corporation in favour of Wong Choong and Chin Kim or bearer. A copy of the letter was sent to Wong Choong and Chin Kim. On 11th May Messrs. Y. S. Lee & Co. sent the cheque to Chin Kim saying that they understood that she was the trustee appointed under the will of her late husband but on 12th May she returned it to them saying that the matter of the purchase would now be in the hands of the Public Trustee. Messrs. Y. S. Lee & Co. then got in touch with the Public Trustee and on his instructions wrote to the appellant on 29th May returning the cheque for $40,000 and asking him to send two cheques for $20,000 each dated 28th May one in favour of the Estate of Wong Choong and the other in favour of Chin Kim. These cheques were drawn and sent to Messrs. Y. S. Lee & Co. who on 2nd June sent them on to Chin Kim and the Public Trustee respectively. Their letter enclosing the cheque to Chin Kim was in the following terms:

"Dear Madam Chin Kim,

Re: Sale of Land held under
Certificate of Title No. 11089
Lot 97, Section 57, Town of Kuala Lumpur

With reference to your letter of the 12th May, 1962 our Mr. Lee has discussed the matter with the Deputy Public Trustee, Federation of Malaya, and it was agreed that we return the cheque for $40,000 to our client in exchange for two cheques of $20,000 each, one made payable to the Estate of Wong Choong, deceased and the other made payable to you.

Accordingly, we have sent a cheque for $20,000 to the Deputy Public Trustee and are enclosing a cheque for $20,000 payable to you for which kindly acknowledge receipt.

We confirm that our Mr. Lee has told you that our client Mr. Loh Boon Siew intends to purchase the property irrespective whether the plans and specifications have been approved or not.

Please make arrangements to evict your tenants in the said land in terms of the Agreement.

Yours faithfully,"

On receipt of the letter addressed to him the Public Trustee discussed the matter with the widow. He advised her that as the plans had not been approved by the Town Planning Authorities the option had not been duly exercised and they decided to tell the purchaser so and to return his cheques. On 7th June solicitors acting for Chin Kim wrote to Messrs. Y. S. Lee & Co. as follows:

"Messrs. Y. S. Lee & Co.,
Advocates and Solicitors,
10 Klyne Street,
Kuala Lumpur.
Dear Sirs,

Land held under C.T. 11089
Lot 97, Section 57, Town of Kuala Lumpur

Madam Chin Kim has handed to us your letter dated 2nd June 1962 enclosing cheque No. PE/6 367036 dated 28th May 1962 and drawn on the Oversea-Chinese Banking Corporation Ltd., Penang for the sum of $20,000 with instructions to reply thereto as follows.

As your client has not duly exercised the option under the agreements we are instructed to return to you the said cheque which is enclosed herewith.

Please acknowledge receipt of the cheque.

Yours faithfully,
Sd. R. R. Chelliah Brothers."

On the following day, 8th June, the Public Trustee wrote a letter to the same effect to Messrs. Y. S. Lee & Co. and returned their cheque.

No reply to either letter was received from or on behalf of the appellant and the widow and the Public Trustee heard no more of the matter for over four years. Then on 27th August 1966 the appellant lodged a caveat on the register against the land to which the agreement related and two days later issued a writ against the widow and the Public Trustee for specific performance of the contract which he claimed had been made by his exercise of the option. The statement of claim endorsed on the writ after setting out the facts proceeded as follows:

"15. The Defendants have repudiated the said Agreement.

16. The Defendants have further failed or neglected to carry out their obligations to evict all tenants on the said land and to give vacant possession of it to the Plaintiff.

17. The Plaintiff has at all times been ready and willing to perform his part of the said Agreement.

18. The Plaintiff has by virtue of the said Agreement lodged on the 29th day of August, 1966 a Caveat against the whole of the said land held by the first and second Defendants.

19. The Plaintiff therefore prays for an Order that:—

(a) the Defendants do on payment to them of the sum of $160,000 transfer to the Plaintiff the said land and for such purpose execute a valid and registerable transfer of such interest in favour of the Plaintiff or his nominee;

(b) in the event of the Defendants failing to execute such valid and registerable transfer within one week of such order, the Senior Assistant Registrar of the Honourable Court do execute such transfer on behalf of the Plaintiff;

(c) the Plaintiff be at liberty after the transfer of the said land to take such steps as may be necessary to evict the persons in occupation of the said land and that the Defendants do pay to the Plaintiff all costs and expenses incurred therefor;

(d) such other relief as may be just and necessary; and

(e) costs."

The defence of the defendants delivered on 19th September 1966 was so far as necessary to be stated in the following terms:

"7. In the said agreement it was a condition precedent to any exercise of the option and the payment of the sum of $40,000 that the Plaintiff should immediately upon the signing of the said agreement instruct a duly qualified architect to prepare plans and specifications of a building or buildings to be erected on the said land and have the said lands and specifications duly approved by the proper authorities.

The said condition was not performed. Plans and specifications of buildings to be erected on the said land have not been approved by the proper authorities.

8. It was a further condition that as soon as the said plans and specifications had been duly approved the Plaintiff should immediately notify the First Defendant and the late Wong Choong in writing of such approval and at the same time pay the said sum of $40,000. No such notice has been given to the Defendants.

9. The buildings on the said land were and are controlled by the Control of Rent Ordinance 1956 and the tenants of the said buildings were and are protected by the said Ordinance.

10. The said agreement provided that the First Defendant and the late Wong Choong should immediately on receipt of the sum of $40,000 apply to the President or Chairman of the Rent Assessment Board for a Certificate that the Rent Assessment Board is satisfied that the owners of the said land intend to demolish all buildings on the said land for the purpose of re-building and in its opinion it is in the public interest that they should be permitted to do so. The said provision required the First Defendant and the late Wong Choong to make a false application to the President of the Rent Assessment Board and to give false evidence.

11. The said agreement is contrary to public policy and is illegal.

12. As regards paragraph 16 of the statement of claim the Defendants state that apart from the illegality of the agreement the Plaintiff by his failure to have the said plans and specifications approved by the proper authorities made it impossible for the Defendants to comply with the provisions of the said agreement and to give vacant possession of the said land to the Plaintiff.

13. It was provided in the said agreement that if within 6 months from the date of payment of the sum of $40,000 the First Defendant and the late Wong Choong were unable to give vacant possession of the said land, the Plaintiff had the exclusive right to terminate the said agreement and the First Defendant and the late Wong Choong should immediately refund the sum of $40,000 free of interest and the agreement should be null and void.

14. The Plaintiff has never tendered to the Defendants the balance sum of $120,000 of the purchase price.

15. It was an express term of the said agreement that time should be of the essence of the contract.

16. The Plaintiff did not on or before the 15th day of May 1962 or at any time duly exercise the option given to him by the said agreement.

17. If the Plaintiff would except for his laches and delay be entitled to specific performance of the said agreement, which is denied, he has by his laches and delay in not beginning proceedings until the 29th day of August 1966 notwithstanding recission by the Defendants on the 7th and 8th day of June 1962 lost such right.

18. The Plaintiff commenced these proceedings only after the enactment of the Control of Rent Act 1966 on or about the 16th day of July 1966.

The said Act makes it easier for land owners to eject tenants from controlled premises."

The case was heard by Dato Abdul Aziz J. on 17th and 18th March 1969 and by his judgment given on 19th June 1969 he ordered that on the plaintiff paying to each defendant $79,400 they should transfer the land in question to the plaintiff and give him vacant possession of the part of the land occupied by them.

In his reasons for judgment the judge held *first* that though it was possible that the stipulation in clause 7 requiring the defendants to apply to the Rent Assessment Board for a certificate was illegal since they had not themselves any intention to develop the land the plaintiff had in effect waived not only the provisions in the contract relating to the obtaining of plans but also the provisions relating to the application to the Rent Assessment Board. Alternatively he held that the stipulation in clause 7 if illegal could be severed from the rest of the contract under section 58 of the Contracts (Malay States) Ordinance 1950. *Secondly* the judge held that the fact that Wong Choong had died before the cheque in favour of him and his wife jointly was received did not prevent it from being a valid tender of the $40,000 payable on the exercise of the option. *Thirdly* he held that the plaintiff's delay in suing to enforce the contract did not disentitle him to an order for specific performance since section 6 of the Limitation Ordinance 1953 allowed six years from the date of the arising of the cause of action for the bringing of an action for specific performance and that though section 32 of the Ordinance preserved the equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise, it was well settled that delay short of the limitation period which was not of such a character as to give rise to an inference of waiver or abandonment of the right to sue and which could not be shown to have prejudiced the defendants would not bar the right to sue. *Finally* he held that as the defendants had refused the tender of the $40,000 they could not complain of the failure of the plaintiff to tender the balance of $120,000 within the following six months. The defendants appealed to the Federal Court which by order dated 13th November 1969 allowed the appeal. The reasons for judgment in which Gill and Ali F.JJ. concurred were given by Ong Hock Thye C.J. on 9th December 1969. The Chief Justice did not say whether or not he agreed with the judge of first instance on the question of illegality or the due exercise of the option. He dealt with the case on the footing that the option had been duly exercised and that the defendants' letters of 7th and 8th June 1961 constituted a repudiation by them of their obligations under the agreement which the plaintiff had the option either to accept or to refuse to accept. He held that the proper inference to be drawn from the plaintiff's four years inactivity was that he had accepted the repudiation and that consequently he was not entitled to any relief in the action. The key passage in the judgment runs as follows:

"In this case one should have thought that the purchaser would not hesitate to make his position clear one way or the

other. Yet he did nothing of the sort. If he disagreed that the vendors were entitled to repudiate, he had only to say so. Had he been at all desirous of completing the purchase — even without vacant possession — all he had to do was perfectly simple, namely, give notice to the vendors of his intention so to do and tender the whole purchase price. What else were the vendors reasonably to assume by reason of his complete silence except that he acquiesced in their tearing up the agreement? What was the proper inference the court should have drawn from his conduct? Should not he, as a reasonable man, have taken action within a reasonable time after a breach of contract by the other party, unless he in fact acquiesced in its rescission? In my opinion a lapse of over four years — between June 8, 1962 and August 29, 1966 — is not even within measurable distance of the reasonable time he needed to make up his mind. His conduct therefore compels me to conclude that he accepted the rescission. Having so agreed I cannot see how he is entitled even to damages, much less specific performance."

On the appeal to the Board all the points taken both in the court of first instance and in the Court of Appeal were argued. Counsel for the appellant further submitted that even if his client was not entitled to specific performance for any reason he was at least entitled to damages in lieu of specific performance.

On the illegality point the respondents contended that on the true construction of section 12 of the Control of Rent Ordinance 1956 the only persons who could be said to be the "owners" of the land were Wong Choong and Chin Kim and that it was an irresistible inference from the wording of the agreement that the parties to it intended that the vendors when they applied to the Rent Assessment Board should state falsely that they intended to demolish the buildings on the land. The appellant on the other hand submitted that the word "owner" in the Ordinance included an owner in equity under a contract for sale or that at all events the parties to the agreement could honestly have thought that it did and that the inference which the respondents sought to draw as to the parties' intentions was quite unjustified. In the view which their Lordships take of the case it is not necessary for them to decide this question and they will assume in the appellant's favour that there was no objection to the contract on the score of illegality. They will also assume in his favour that the fact that Wong Choong had died before the cheque for $40,000 was received by Messrs. Y. S. Lee & Co. would not enable the respondents to say that the deposit had not been paid within the period allowed for the exercise of the option. Even so, however, their Lordships are clearly of opinion that the option was not duly exercised. Clause 3 of the contract standing alone is not a provision which is exclusively for the benefit of the purchaser. Under clause 7 the vendors were obliged to apply to the Board for a certificate at their own expense and unless they could produce plans of the proposed building which had been approved by the authorities their money would be wasted. The appellant's contention which succeeded before the judge of first instance was that in truth he had waived not only clause 3 but clauses 7 and 8 as well and meant to buy the land for $160,000 subject to the tenancies. Their Lordships do not think that it was in fact competent to the purchaser to waive clauses 3, 7 and 8. If his intention had been what he says it was he would have been offering to make a new contract which the vendors could not have been obliged to enter into — though in fact it would have been more favourable to them than the agreement which they had signed. But even if the appellant could have waived clauses 3, 7 and 8 it is quite clear that he did not do so. His solicitors' letter of 5th May 1962 which says that their client proposes to buy the property whether or not plans are approved goes on to call on the vendors to carry out their obligations under clause 7 and Messrs. Y. S. Lee & Co. repeat that demand in their letter of 2nd June 1962 written on behalf of the appellant after the option period had expired. Indeed paragraph 16 of the statement of claim shows that even in August 1966 the appellant was still contending that the vendors' obligations under clause 7 continued notwithstanding his so-called "waiver" of clause 3. It was apparently only at the trial that the appellant took the line that the vendors were only obliged to give him vacant possession of the part of the land occupied by them.

As their Lordships are of opinion that the option was never duly exercised the point upon which the Federal Court decided the case against the appellant does not arise. But on the assumption that the respondents by their letters of 7th and 8th June 1962 repudiated their obligations under the agreement their Lordships would agree with the Chief Justice that the appellant had no right to a decree for specific performance when he issued his writ on 29th August 1966. His failure to reply to the letters; his failure to tender the balance of the purchase price; and his total inactivity when activity of some sort was called for if he was intending to keep the contract alive would together justify the inference that he had accepted the vendors' repudiation long before he issued his writ. He would, of course — on the assumption which is being made — have been entitled to recover damages for the vendors' breach of contract if he sued for them before the period of limitation expired but in his writ in this action he did not claim damages as an alternative to specific performance. Whether nevertheless the court could or should have awarded him damages in this action would have been a difficult question involving among other things the construction of section 18 and section 28 of the Specific Relief (Malay States) Ordinance 1950. On the one hand their Lordships were referred to a line of decisions in the Indian courts involving the construction of the corresponding sections in the Indian Specific Relief Act 1877 which lay down that where the court in its discretion refuses a decree for specific performance it may award damages to the injured party even though he has not claimed damages in the writ. On the other hand it could have been argued that since by accepting the repudiation of the contract the appellant disentitled himself to a decree for specific performance he could not in a specific performance action recover damages in lieu of specific performance — see *Hipgrave* v. *Case*[1] and *Ardeshir Mama* v. *Flora Sassoon*.[2] In the view which their Lordships take of the case this question is purely hypothetical and they express no opinion on it. They will advise the Head of Malaysia that the appeal be dismissed and that

the appellant should pay the respondents' costs before the Board.

Appeal dismissed.

Solicitors: *Linklaters & Paines; Graham Page & Co.; R. R. Chelliah Bros.*

SINGAPORE REPORTS

ASHOKA TRADERS v. GOBIND P. VASANDANI

[C.A. (Wee Chong Jin C.J., Chua and Choor Singh JJ.) November 9, 1971]

[Singapore — Civil Appeal No. 17 of 1971]

Debtors — Arrest — Security — Rescission of order for — Debtors Act (Cap. 19, 1970 Ed.), ss. 13 and 16.

This was an application by the defendant/respondent under section 16 of the Debtors Act for an order to rescind an order of court made on March 4, 1971, and to release the security given by the defendant.

On March 4, 1971, an order was made, pursuant to an application made by the plaintiffs/appellants under section 13 of the Debtors Act, in pursuance of which the defendant/respondent was arrested and ordered to furnish security in the sum of $10,845.66. The security was duly given and the defendant/respondent released.

It was not disputed that the defendant/respondent was an Indian national, that he was ordinarily resident in Indonesia, and that he carried on business as a textile merchant in Djakarta. The evidence showed that the purpose of his visits to Singapore was for buying merchandise for his business in Djakarta. The purchases have all been on credit and the defendant stated that he was indebted to several firms in Singapore, including the plaintiffs.

Tan Ah Tah J. held, allowing the defendant's application, that the plaintiffs had failed to make out a case for the arrest of the defendant because (a) the defendant was not carrying on business in Singapore, and (b) the defendant had, in the circumstances of this case, no intention to prejudice the plaintiffs, or to avoid any process of the court, or to obstruct or delay the execution of any judgment made against him. On appeal by the plaintiffs to the Court of Appeal,

Held, dismissing the appeal: the security given by the respondent should be discharged in accordance with the judgment of the learned trial judge.

Cases referred to:-

(1) *In re Gutierrez* (1879) 11 Ch. D. 298.

(2) *Re a Debtor* [1952] 1 All E.R. 519.

COURT OF APPEAL.

David Chelliah for the appellants.

J. B. Jeyaretnam for the respondent.

In the court below *David Chelliah* appeared for the plaintiffs, *J. B. Jeyaretnam* for the defendant. The following grounds of decision were given on May 15, 1971:

Tan Ah Tah J.: On the 4th March 1971, as the result of an application made by the plaintiffs under the provisions of section 13 of the Debtors Act (Cap. 19, 1970 Ed.), Kulasekaram J. ordered, *inter alia*, that the defendant be arrested and brought before the court to show cause why he should not furnish security in the sum of $10,845.66 for his appearance and for costs. Pursuant to the said order, the defendant was arrested on the 5th March 1971 and brought before D'Cotta J., who, after hearing the arguments of counsel for the plaintiffs and the defendant, who appeared in person, ordered that the defendant be detained until such time as he should give security in the form of a banker's guarantee for the sum of $10,845.66 for his appearance and for costs. The security was duly given and the defendant was released. He now makes an